

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JASON SMITH,
Plaintiff,

v.

DR. LAW FU, et al.,
Defendants.

Case No. 19-02119 BLF (PR)

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

(Docket No. 29)

Plaintiff, a California inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against medical staff at the Correctional Training Facility (“CTF”). Dkt. No. 1. The Court found the complaint stated a cognizable claim under the Eighth Amendment and ordered Defendants Dr. Law Fu, Dr. Rachel Ross,¹ Dr. Mark Kowall,² M. Votaw, and S. Posson to file a motion for summary judgment or other dispositive motion. Dkt. No. 4.³

¹ Defendant Dr. Rachel Ross has not yet been served, and the last request for waiver of summons sent to her at the address provided by Plaintiff has not been returned. Dkt. Nos. 16, 20, 22.

² Defendant Dr. Mark Kowall separately filed a motion to dismiss and motion for summary judgment which has been addressed in a separate order. Dkt. Nos. 27, 39, 51.

³ In the same order, the Court granted Plaintiff leave to amend to state sufficient facts to

Defendants Fu, Votaw, and Posson filed a motion for summary judgment pursuant to Rule 56 on the ground that undisputed material facts establish that they did not act with deliberate indifference to any serious medical need. Dkt. No. 29. In support, Defendants filed declarations and exhibits.⁴ *Id.* Plaintiff filed opposition along with a declaration and exhibits in support. Dkt. Nos. 45, 46. Defendants filed a reply. Dkt. No. 47.

For the reasons stated below, Defendants' motion for summary judgment is **GRANTED.**

DISCUSSION

I. Statement of Facts⁵

A. Parties

Plaintiff is an inmate at the Correctional Training Facility ("CTF") in Central Soledad, where he was housed during the underlying events of this action. Dkt. No. 1 at 1.

Defendant Dr. Fu is a physician and surgeon, who is employed by the CDCR and currently works at Deuel Vocational Institution ("DVI") in Tracy. Fu Decl. ¶ 1, Dkt. No. 29-2. Defendant Fu was working at CTF at the time of the underlying events of this action. *Id.* Defendant Fu reviewed Plaintiff's medical records maintained by the CDCR and is familiar with its contents. *Id.* ¶ 4, Ex. A.

Defendant Dr. Posson is an osteopathic physician and surgeon, who is currently employed by the CDCR as Chief Medical Executive at CTF. Posson Decl. ¶ 1. His

state a First Amendment claim, but Plaintiff filed notice that he wished to proceed solely on the Eighth Amendment claim. Dkt. No. 5. Accordingly, the First Amendment claim was stricken from the complaint. Dkt. No. 6 at 1.

⁴ In support of their summary judgment motion, Defendants submit the declarations of Defendant Fu, Dkt. No. 29-2, Defendant Posson, Dkt. No. 29-3, Defendant Votaw, Dkt. No. 29-4, and counsel Wil Fong, Dkt. No. 29-5. The declarations are accompanied by exhibits that contain authenticated copies of excerpts from Plaintiff's health care records and inmate appeal records. *Id.*

⁵ The following facts are not disputed unless otherwise stated.

responsibilities include overseeing medical care services to inmates. *Id.* Defendant Posson reviewed Plaintiff's health care grievance package, his health records, and all pertinent departmental policies and procedures. *Id.* ¶ 8.

Defendant M. Votaw is employed by the CDCR as a Prison Health Care Grievance Coordinator at CTF. Votaw Decl. ¶ 1. Her responsibilities involve processing and forwarding 602 appeals to CDCR medical staff for review in accordance with Title 15 guidelines. *Id.* ¶ 8. Defendant Votaw reviewed Plaintiff's health care appeal records maintained by the CDCR and is familiar with its contents, including Plaintiff's appeal No CTF HC 18001258, related to this lawsuit. *Id.* ¶ 3, Ex. A.

B. Methadone Taper

Plaintiff had surgery on his right shoulder on June 10, 2015. Smith Decl. ¶ 9, Dkt. No. 46; *id.*, Ex. C. He was prescribed Methadone (15 to 20 mg per day) to treat his chronic pain as of June 17, 2015. *Id.*, Ex. D.

Plaintiff was diagnosed with osteoarthritis in his right shoulder on October 12, 2016. Fu Decl. ¶ 7, Ex. A at CDCR-000010. At that time, Plaintiff was still prescribed Methadone, an opioid pain medication, for 15 mg daily (10 mg in the morning, and 5 mg in the afternoon). *Id.*, Ex. A at CDCR-000159.

On March 22, 2018, as part of his treatment plan, Plaintiff signed a Chronic Pain Provider-Patient Agreement/Informed Consent for Opioid Pain Medication with his primary care provider ("PCP"), Dr. Friederichs. Fu Decl. ¶ 8, Ex. A at 000122. In that agreement, Plaintiff agreed that while he was taking Methadone, he would not use any other non-prescribed mood-altering drugs. *Id.* Plaintiff also agreed to routine urine drug testing and acknowledged that testing positive for improper drug use could result in his Methadone being tapered and stopped. *Id.*

On May 21, 2018, Plaintiff submitted a urine sample for drug testing which came back positive for cannabis/marijuana. Fu Decl. ¶ 9, Ex. A at CDCR-000159, 000281. Plaintiff's marijuana use constituted a violation of both his pain treatment contract and

1 CDCR policy. *Id.* According to Defendants, using marijuana while taking Methadone
 2 posed an adverse health risk to Plaintiff as doing so increases the risk of central nervous
 3 system depression. *Id.* Plaintiff later challenged the validity of the positive urine sample,
 4 contending that the result could have been a false positive because he was taking other
 5 medication, i.e., Motrin, Ibuprofen, and Naproxen, which was available at the prison's
 6 canteen, free of cost. Smith Decl. ¶ 11, Ex. E.

7 Defendant Fu saw Plaintiff one time on July 29, 2018, during a clinic appointment
 8 at CTF. *Id.* ¶ 6. Defendant Fu was not Plaintiff's primary care provider, but he evaluated
 9 Plaintiff on that date while covering an extra work shift at CTF. *Id.*, Ex. A at CDCR-0681.
 10 At this appointment, Defendant Fu tapered Plaintiff off Methadone due to his pain contract
 11 violation for testing positive for cannabis on May 21, 2018. *Id.* ¶ 10, Ex. A at CDCR-
 12 000156-000157, 000222, 000255. At that time, Plaintiff was being provided Methadone,
 13 15 mg daily. *Id.* Defendant Fu's taper plan consisted of 10 mg of Methadone daily for
 14 seven days, then 5 mg daily for another seven days. *Id.* ¶ 11, Ex. A at CDCR-000020,
 15 000021, 000158.⁶ As an alternative pain medication, Defendant Fu offered Plaintiff
 16 Tylenol 3 (Tylenol with codeine), but Plaintiff stated he could not take that medication
 17 because he was allergic to codeine. Fu Decl. ¶ 12; Smith Decl. ¶ 12. Defendant Fu noted
 18 that Plaintiff would follow-up with his PCP for alternative treatment for his shoulder and
 19 further evaluation of his chronic pain care. *Id.*, Ex. A at CDCR-000157. Defendant Fu
 20 had no further involvement in Plaintiff's medical care after that appointment.

21 According to Plaintiff, Defendant Fu was the only physician who made the decision
 22 to discontinue his methadone treatment on July 29, 2018.⁷ Smith Decl. ¶ 12. Plaintiff also

24 ⁶ This prescription is reflected in Plaintiff's medical records as Methadone, 5 mg,
 25 BIDAM+PM (once in the morning and once in the afternoon) from 7/29/18 (first dose) to
 8/5/18 (stop date); and then 5 mg, qPM (once in the afternoon) from 8/5/18 (first dose) to
 8/12/18 (stop date).

26 ⁷ Defendants assert that Dr. Anderson, not a party to this action, made the decision to
 27 discontinue the Methadone. Dkt. No. 29 at 7. However, this appears to be a misreading of
 28 the correspondence regarding Plaintiff's treatment. Fu Decl., Ex. A at CDCR-000111-

1 states that Defendant Fu told him during their appointment that had Plaintiff signed the
2 waiver of liability presented to him by Defendant Kowall on July 25, 2018, for an
3 evaluation for orthopedic surgery, the methadone treatment would not have been
4 discontinued. Smith Decl. ¶ 15.

5 Plaintiff had three follow-up appointments thereafter regarding his pain
6 management care. First on August 6, 2018, Plaintiff met with Defendant Dr. Ross,
7 complaining of his methadone tapering. Fu Decl., Ex. B at CDCR 000155, Dkt. No. 29-1
8 at 19. According to the progress notes, Defendant Ross discussed the 4 classes of drugs to
9 try help manage his chronic pain: acetaminophen, anti-inflammatories that are
10 nonsteroidal, antiseizure medicine, and antidepressants. *Id.* Defendant Ross also informed
11 Plaintiff of the option to use Capsaicin, a cream that has been known to help with chronic
12 pain in the past. *Id.* The notes indicate that Plaintiff chose a trial of the Capsaicin Cream.
13 *Id.* Defendant Ross noted that Plaintiff's taper of Methadone would finish in 6 days. *Id.*
14 Plaintiff's Methadone taper finished on August 12, 2018. Smith Decl. ¶ 20.

15 Plaintiff had his next follow-up on September 6, 2018, with Dr. Anderson, who is
16 not a party to this action. Fu Decl., Ex. B at CDCR 000154-000155, Dkt. No. 29-1 at 18-
17 19. The progress notes indicate that Plaintiff was "very upset" regarding the Methadone
18 taper and requested to be placed back on it due to uncontrolled pain. *Id.* at CDCR-000154.
19 Dr. Anderson discussed with Plaintiff "at length" the reason for the Methadone taper, i.e.,
20 the breach in pain management contract. *Id.* at CDCR-000155. Dr. Anderson indicated
21 that she would not reinstate the Methadone but would do a trial of non-narcotic
22 medication, "oxcarbazepine twice daily." *Id.*

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25 000112; Dkt. No. 29-1 at 11-12. On September 9, 2019, Nurse Carlos Soriano sent an
26 electronic message to Dr. Anderson regarding Plaintiff's prescription for oxcarbazepine,
27 which Plaintiff reported was "not working for him." *Id.*, Ex. A at CDCR-000112. In
28 response on September 12, 2018, Dr. Anderson messaged, "I discontinued it," which
clearly refers to the oxcarbazepine, not the methadone. *Id.* Dr. Anderson then states:
"[Plaintiff] was recently taken off of methadone due to violation of pain contract and
opiate therapy will not be restarted. I ordered regular Tylenol he can take for pain." *Id.*

Plaintiff had another follow-up on September 27, 2018, with Dr. Thao Nguyen, not a party to this action. Fu Decl., Ex. B at CDCR 000152-000153, Dkt. No. 29-1 at 16-17. The progress notes indicate that Plaintiff was still “very upset” over the Methadone taper. *Id.* at CDCR-000152. Dr. Nguyen noted that Plaintiff had tried “trileptal, sulindac, ibuprofen, naproxen, and Tylenol 3.” *Id.* at CDCR-000153. In response to Plaintiff’s request for PT (physical therapy) and theraband, Dr. Nguyen “referred him.” *Id.* Elavil was also prescribed to help Plaintiff sleep. *Id.*

According to Plaintiff, the only medication he was prescribed to alleviate his chronic pain and opioid withdrawal from August 12, 2018 to September 6, 2018, was Capsaicin Cream, which only inflamed his right shoulder chronic pain. Smith Decl. ¶ 20. Three days after his last Methadone dose on August 12, 2018, Plaintiff filed an “emergency” health care appeal seeking care for his chronic pain and opioid withdrawal symptoms, i.e., headaches, dizziness, diarrhea, cramps, etc. *Id.* ¶¶ 20, 21. That appeal is discussed below.

C. Health Care Appeal

On August 15, 2018, Plaintiff submitted a 602 Health Care Appeal (“602 Appeal”), complaining of being removed from Methadone; it was assigned appeal No. CTF HC 18001258. Votaw Decl. ¶ 5, Ex. A at CDCR-00679. Pursuant to departmental procedure, Plaintiff’s appeal was clinically triaged on August 16, 2018, by M. Chua, Health Care Appeals Registered Nurse, to determine if his appeal was to be processed on an expedited basis. *Id.* ¶ 6, Ex. A at CDCR-00679. RN Chua noted Plaintiff’s appeal should be processed as a non-expedited appeal. *Id.*

On August 21, 2018, Defendant Votaw screened the appeal, and assigned it to the Central Clinic Primary Care Provider. Votaw Decl. ¶ 7, Ex. A at CDCR-00679. She does not determinate whether an inmate’s 602 appeals should be processed as expedited or non-expedited and did not do so with respect to Plaintiff’s appeal. *Id.* ¶ 9. The determination is made by CDCR medical staff who utilize clinical judgment within the scope of their

1 licensure. *Id.*

2 On October 18, 2018, Defendant Posson prepared the Institutional Level Response
3 for Plaintiff's 602 Health Care Appeal ("602 Appeal") regarding Plaintiff's complaint of
4 being removed from Methadone. Posson Decl. ¶ 7, Ex. B at CDCR-00682-00684. A face-
5 to-face interview was not conducted as Plaintiff did not request one by initialing the
6 appropriate box on the 602 Appeal grievance form. *Id.*, Ex. B at CDCR-00679. Defendant
7 Posson's response noted the fact that Plaintiff had tested positive for marijuana after a
8 random urine drug screen with his PCP on May 21, 2018. *Id.* ¶ 8, Ex. A at CDCR-000159,
9 000281; *id.*, Ex. B at CDCR-00683. It was also noted that Plaintiff continued to receive
10 Methadone until he was seen for a follow-up with Defendant Fu on July 29, 2018. *Id.* ¶ 9.
11 At that appointment, Defendant Fu advised Plaintiff that his positive marijuana urine drug
12 screen constituted a violation of his pain care contract. *Id.*, Ex. A at CDCR-000156-
13 000157; *id.*, Ex. B at CDCR-00683. Plaintiff's plan of care was changed to taper him off
14 Methadone, with a follow-up to discuss alternative pain management therapies such as
15 oxcarbazepine. *Id.*, Ex. A at CDCR-000020, 000021, 000154-055, 000158; *id.*, Ex B at
16 CDCR-00683. Defendant Posson also noted that Plaintiff had informed his "PCP" on July
17 29, 2018, that he did not want to sign the liability documents required for treatment by the
18 outside specialist, and that in refusing to sign, he was only refusing to waive liability and
19 not the procedure. *Id.* ¶ 11, Ex. A at CDCR-000156; *id.*, Ex. B at CDCR-00683.
20 Defendant Posson's response informed Plaintiff that while he has the right to refuse most
21 health care, Plaintiff is encouraged to cooperate with his health care providers to achieve
22 optimal clinical outcome, and he also has the right to refuse to sign waivers or consents,
23 but it may result in the specialty provider exercising their right to refuse treatment. *Id.*
24 Defendant Posson also informed Plaintiff that patient-specific factors such as
25 comorbidities, previous history, and risk/benefit assessment are considered when making
26 drug selection. *Id.* ¶ 12, Ex. B at CDCR-000683. Plaintiff was also informed that opioids
27 were not the preferred treatment for chronic pain, and that non-pharmacologic therapies
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1 and non-opioid therapies are preferred for managing chronic non-cancer pain. *Id.*
 2 Defendant Posson stated that the opioid therapy guidelines outlined in the CCHCS Care
 3 Guide: Pain Management Part 3 – Opioid Therapy, which sets forth the CDCR’s policy,
 4 are based on the 2016 Centers for Disease Control and Prevention Guidelines for
 5 Prescribing Opioids. *Id.* Defendant Posson stated that Plaintiff’s medical condition would
 6 continue to be monitored, with care provided as determined as medically or clinically
 7 indicated by the PCP. *Id.* ¶ 13, Ex. B at CDCR-0183-0184, 0302. Lastly, Defendant
 8 Posson stated that California law directs Plaintiff’s health care providers to offer and
 9 provide only the care they determine to be currently medically or clinically necessary for
 10 him, in accordance with appropriate policies and procedures. *Id.* ¶ 14, Ex. B at CDCR-
 11 00684. Previous orders from other health care facilities or staff, input from health care
 12 consultants, and/or his own personal preferences may be considered, but do not control the
 13 professional judgment of his current health care providers. *Id.* Based on these reasons,
 14 Defendant Posson’s decision at the Institutional Level Response was that no additional
 15 intervention was needed. *Id.* ¶ 15, Ex. B at CDCR-00682-00684.

16 According to Plaintiff, various medical providers, including his surgeon Dr. Paik,
 17 PCP Dr. T. Friederichs, and Dr. Anderson, had recommended physical therapy as recently
 18 as September 6, 2018. Smith Decl. ¶ 24, Ex. L.

19 **II. Summary Judgment**

20 Summary judgment is proper where the pleadings, discovery and affidavits show
 21 that there is “no genuine dispute as to any material fact and the movant is entitled to
 22 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A court will grant summary judgment
 23 “against a party who fails to make a showing sufficient to establish the existence of an
 24 element essential to that party’s case, and on which that party will bear the burden of proof
 25 at trial . . . since a complete failure of proof concerning an essential element of the
 26 nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v.*
 27 *Cattrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of
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1 the lawsuit under governing law, and a dispute about such a material fact is genuine “if the
2 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”
3 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

4 Generally, the moving party bears the initial burden of identifying those portions of
5 the record which demonstrate the absence of a genuine issue of material fact. *See Celotex*
6 *Corp.*, 477 U.S. at 323. Where the moving party will have the burden of proof on an issue
7 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other
8 than for the moving party. But on an issue for which the opposing party will have the
9 burden of proof at trial, the moving party need only point out “that there is an absence of
10 evidence to support the nonmoving party’s case.” *Id.* at 325. If the evidence in opposition
11 to the motion is merely colorable, or is not significantly probative, summary judgment may
12 be granted. *See Liberty Lobby*, 477 U.S. at 249-50.

13 The burden then shifts to the nonmoving party to “go beyond the pleadings and by
14 her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on
15 file,’ designate specific facts showing that there is a genuine issue for trial.” *Celotex*
16 *Corp.*, 477 U.S. at 324 (citations omitted); Fed. R. Civ. P. 56(e). “This burden is not a
17 light one. The non-moving party must show more than the mere existence of a scintilla of
18 evidence.” *In re Oracle Corporation Securities Litigation*, 627 F.3d 376, 387 (9th Cir.
19 2010) (citing *Liberty Lobby*, 477 U.S. at 252). “The non-moving party must do more than
20 show there is some ‘metaphysical doubt’ as to the material facts at issue.” *Id.* (citing
21 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). “In
22 fact, the non-moving party must come forth with evidence from which a jury could
23 reasonably render a verdict in the non-moving party’s favor.” *Id.* (citing *Liberty Lobby*,
24 477 U.S. at 252). If the nonmoving party fails to make this showing, “the moving party is
25 entitled to judgment as a matter of law.” *Celotex Corp.*, 477 U.S. at 323.

26 The Court’s function on a summary judgment motion is not to make credibility
27 determinations or weigh conflicting evidence with respect to a material fact. *See T.W.*

1 *Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).
 2 The evidence must be viewed in the light most favorable to the nonmoving party, and the
 3 inferences to be drawn from the facts must be viewed in a light most favorable to the
 4 nonmoving party. *See id.* at 631. It is not the task of the district court to scour the record
 5 in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.
 6 1996). The nonmoving party has the burden of identifying with reasonable particularity
 7 the evidence that precludes summary judgment. *Id.* If the nonmoving party fails to do so,
 8 the district court may properly grant summary judgment in favor of the moving party. *See*
 9 *id.*; *see, e.g., Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1028-29
 10 (9th Cir. 2001).

11 **A. Deliberate Indifference**

12 Deliberate indifference to a prisoner’s serious medical needs violates the Eighth
 13 Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the
 14 Eighth Amendment only when two requirements are met: (1) the deprivation alleged is,
 15 objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent
 16 to the inmate’s health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

17 A “serious” medical need exists if the failure to treat a prisoner’s condition could
 18 result in further significant injury or the “unnecessary and wanton infliction of pain.” *Id.*
 19 The following are examples of indications that a prisoner has a “serious” need for medical
 20 treatment: the existence of an injury that a reasonable doctor or patient would find
 21 important and worthy of comment or treatment; the presence of a medical condition that
 22 significantly affects an individual’s daily activities; or the existence of chronic and
 23 substantial pain. *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled
 24 on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)
 25 (en banc).

26 A prison official is deliberately indifferent if he knows that a prisoner faces a
 27 substantial risk of serious harm and disregards that risk by failing to take reasonable steps
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1 to abate it. *See Farmer*, 511 U.S. at 837. The official must both know of “facts from
2 which the inference could be drawn” that an excessive risk of harm exists, and he must
3 actually draw that inference. *Id.* If a prison official should have been aware of the risk,
4 but was not, then the official has not violated the Eighth Amendment, no matter how
5 severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002).

6 **B. Analysis**

7 Plaintiff claims Defendant Fu “knowingly, unlawfully, and with specific intent
8 violated [his] rights by: (1) levying reprisal against Plaintiff for... not waiving his Rights
9 to Liability prior to receiving Medical treatment and (2) subjecting Plaintiff to cruel and
10 unusual punishment by abruptly discontinuing previously prescribed medication of
11 Methadone without prescribing any Low Level medication in order to avoid withdrawal
12 symptoms.” Dkt. No. 1 at 8.

13 Plaintiff claims Defendant Votaw “knowingly, unlawfully, and with specific intent
14 violated Plaintiff’s rights by Deliberately ignoring plaintiff’s submitted Emergency Appeal
15 per Title 15 3084.9(a)(1), and screening such appeal as a regular Appeal thereby subjecting
16 Plaintiff to significant injuries which could have been avoided by occurred as a direct
17 result of Defendant M. Votaw’s action.” Dkt. No. 1 at 9.

18 Plaintiff claims Defendant Posson “knowingly, unlawfully, and with specific intent
19 violated Plaintiff’s rights by Deliberately taking NO action on intervening to requested
20 recommended Physical Therapy and NO intervention on Low Level medication in order to
21 avoid withdrawal symptoms.” Dkt. No. 1 at 10 (original emphasis).

22 Defendants first assert that the undisputed facts show that Defendants Fu, Posson,
23 and Votaw did not participate in any act that deprived Plaintiff of his federally protected
24 rights by being deliberately indifferent to any of Plaintiff’s serious medical needs. Dkt.
25 No. 29 at 13. They assert that Plaintiff was provided with Methadone for his chronic pain
26 on the condition that he refrain from using any non-prescribed mood-altering drug, such as
27 marijuana. *Id.* Despite this agreement, Plaintiff used marijuana as shown by a routine
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1 urine test on May 21, 2018. *Id.* Because he violated his pain contract and CDCR policy
2 and because using marijuana and Methadone posed a health risk to him, Dr. Anderson
3 decided to taper Plaintiff off the Methadone and try him on an alternative non-opioid
4 medication, such as oxcarbazepine.⁸ *Id.* Defendants assert that when Defendant Fu saw
5 Plaintiff on July 29, 2018, for the purpose of tapering him off Methadone by bringing his
6 15 mg daily dose down to 10 mg for one week and then 5 mg for another week, his course
7 of treatment was medically appropriate and consistent with CDCR policy. *Id.* at 13-14.
8 Defendants also assert that Defendant Posson's decision that no intervention on Plaintiff's
9 602 appeal was needed at the Institutional Level Review was proper because Plaintiff's
10 Methadone was not abruptly stopped, as he claimed, and he continued to receive PCP
11 follow-up appointments regarding his pain management after the tapering. *Id.* at 14.
12 Furthermore, Defendants assert that Defendant Votaw played no role in determining
13 whether Plaintiff's 602 Appeal should be processed as an expedited or non-expedited
14 appeal, and that Defendant Votaw did not provide Plaintiff with any medical care nor was
15 she involved in making any medical decisions for him. *Id.* Based on these facts,
16 Defendants assert that they did not cause Plaintiff to suffer any deprivation of his
17 constitutional rights.

18 Defendants also assert that that there is no evidence that they acted with deliberate
19 indifference towards Plaintiff. Dkt. No. 29 at 16. Defendants assert that Plaintiff was
20 properly tapered off his Methadone when he violated his pain contract and CDCR policy
21 by testing positive for marijuana use. *Id.* Defendants assert that the medical care he
22 received was not medically unacceptable, and his difference of opinion in that regard is not
23 sufficient to establish deliberate indifference. *Id.*

24 In opposition, Plaintiff maintains that Defendant Fu deliberately and intentionally
25 interfered with his previously prescribed Methadone treatment. Dkt. No. 45 at 11.

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27 ⁸ See *infra* at 4-5, fn. 7.

1 Plaintiff repeats his claim that Defendant Fu told him that he was discontinuing the
2 Methadone because Plaintiff refused to sign Defendant Kowall's waiver of liability on July
3 25, 2018, but that he would document the reason as Plaintiff's positive urine sample test
4 for cannabis. *Id.* Plaintiff asserts that Defendant Posson purposefully omitted his
5 declaration contending that the urine test could have been a false positive from his
6 decision, and that his failure to intervene was deliberate and intentional, causing Plaintiff
7 further pain and suffering. *Id.* at 12. Plaintiff asserts that his documented medical records
8 confirm that he had been taking Methadone since June 17, 2015, and that Defendants Fu
9 and Posson were aware of his chronic pain which warranted the Methadone prescription
10 for over three years. *Id.* Therefore, Plaintiff asserts the records raise an inference that
11 Defendants Fu and Posson were aware of Plaintiff's need for chronic pain medication at
12 the time Defendant Fu discontinued the Methadone. *Id.* Furthermore, Plaintiff asserts
13 Defendant Fu was deliberately indifferent to his chronic pain in abruptly discontinuing his
14 Methadone medication, failing to prescribe any low level medication in its place, and then
15 attempting to prescribe the one medication to which Plaintiff was allergic. *Id.* at 13-14.
16 Plaintiff asserts that he has also raised a triable issue that the Capsaicin Cream that was
17 prescribed from August 12, 2018 to September 6, 2018, was an inappropriate substitute for
18 methadone. *Id.* at 14. In support, Plaintiff requests judicial notice of several cases
19 involving claims for insufficient pain management. *Id.* at 13-15. Plaintiff asserts,
20 therefore, Defendants are not entitled to summary judgment because undisputed material
21 facts show that Defendants were aware of Plaintiff's ongoing opioid withdrawal symptoms
22 but disregarded those symptoms. *Id.* at 15.

23 In reply, Defendants assert that Plaintiff does not dispute that his May 21, 2018,
24 urine sample tested positive for marijuana. Dkt. No. 47 at 1. Defendants also assert
25 Plaintiff does not dispute that the use of marijuana constituted a violation of his pain
26 treatment contract and CDCR policy, and that using marijuana while taking Methadone
27 posed a health risk. *Id.* at 1-2. For these reasons, Defendants assert, it was appropriate for
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1 Dr. Anderson to decide to take Plaintiff off of Methadone, and for Defendant Fu to
 2 evaluate Plaintiff for the purpose of tapering him off Methadone on July 29, 2018.⁹ *Id.* at
 3 2. Furthermore, Defendants assert Plaintiff does not dispute that Defendant Fu tapered
 4 him off of Methadone rather than stop it “cold turkey”; in his grievance, Plaintiff
 5 complained that “there should have been a longer period of tapering.” *Id.* at 2; Posson
 6 Decl., Ex. A at CDCR-00680. Defendants point out that Plaintiff complains for the first
 7 time in opposition that Defendant Fu should have referred him to the prison’s Pain
 8 Management Committee or the Clinical Opiate Withdrawal Scale (“COWS”), *id.*, citing
 9 Smith Decl. ¶¶ 17-18. Defendants assert, however, that the tapering of Plaintiff’s
 10 Methadone was medically appropriate, and that Plaintiff presents no evidence to the
 11 contrary. *Id.* at 2. With respect to Defendant Posson, Defendants assert Plaintiff does not
 12 dispute the medical records reviewed by Defendant Posson in conducting the Institutional
 13 Level Review of Plaintiff’s health care grievance, which showed that (1) Plaintiff violated
 14 his pain care contract by testing positive for marijuana; (2) Defendant Fu tapered Plaintiff
 15 off of Methadone because he violated his pain care contract; and (3) Plaintiff had received,
 16 and was continuing to receive, physician evaluations for his pain management plan of care.
 17 *Id.* For these reasons, Defendants assert, Defendant Posson appropriately determined that
 18 no additional intervention was needed at that time. *Id.* With respect to physical therapy,
 19 Defendants assert that Plaintiff did not raise that issue in his health care grievance, and
 20 therefore there was no reason for Defendant Posson to specifically address that issue. *Id.*
 21 Lastly, Defendants assert Plaintiff presents no opposition or discussion addressing
 22 Defendant Votaw’s motion for summary judgment. *Id.* Defendants assert that Defendant
 23 Votaw only administratively processed Plaintiff’s health care grievance by forwarding it to
 24 medical staff for review, and she played no role in determining whether the grievance
 25 should be processed as expedited or non-expedited nor was she involved in Plaintiff’s

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 27 ⁹ But as discussed above, the medical records do not clearly indicate the Dr. Anderson was
 28 the one who made this decision. *See supra* at 4-5, fn. 7.

1 medical care. *Id.* at 2-3.

2 Viewing the evidence in the light most favorable to Plaintiff, the Court finds there
3 exist no genuine dispute as to any material fact relating to Plaintiff's claim of deliberate
4 indifference against Defendants. First with respect to Defendant Votaw, Defendants
5 submit evidence showing that Nurse Chua, not a party to this action, was the medical staff
6 who decided that Plaintiff's health care grievance was not to be expedited. *See supra* at 6.
7 In response, Plaintiff fails to submit evidence showing that Defendant Votaw did anything
8 else but forward Plaintiff's health care grievance to the proper medical staff after Nurse
9 Chua's designation. Plaintiff presents no evidence that Defendant Votaw's role was
10 anything more than that or that she had authority to override Nurse Chua's determination.
11 Accordingly, summary judgment should be granted with respect to the Eighth Amendment
12 claim against Defendant Votaw because there is simply no evidence that she acted with
13 deliberate indifference with respect to Plaintiff's serious medical needs. *See Celotex*
14 *Corp.*, 477 U.S. at 323.

15 With regards to Defendant Fu, there are several factual disputes, but none are
16 material. Even if the Court assumes Defendant Fu was the one who ordered the taper as
17 Plaintiff asserts, the undisputed evidence shows that Plaintiff tested positive for marijuana
18 from a urine sample that was taken on May 21, 2018. *See supra* at 3-4. There is no
19 dispute that using marijuana violated the terms of Plaintiff's pain treatment contract. *Id.* at
20 4. Although Plaintiff asserts that the result *could* have been a false positive, the fact
21 remains that Defendant Fu had a reasonable basis to discontinue the Methadone treatment
22 based on his belief that Plaintiff had violated the pain care contract as indicated by the
23 positive urine test. Furthermore, the evidence shows that Defendant Fu did not "abruptly"
24 discontinue the Methadone as Plaintiff claims, but that Defendant Fu ordered it be tapered
25 over a two-week period. *Id.* at 4. When Plaintiff declined the offer of Tylenol with
26 codeine as an alternative pain medication, Defendant Fu noted that Plaintiff would follow
27 up with his PCP "for alternate treatment of his shoulder and evaluations of pain." *Id.*; Fu
28

Decl., Ex. A at CDCR-000157. There is no dispute that Plaintiff had a follow-up appointment just a week later, on August 6, 2018. *Id.* at 5. In opposition, Plaintiff asserts that Defendant Fu was designated as his “PCP” on July 29, 2018, attempting to assert thereby that Defendant Fu was responsible for his care thereafter. Dkt. No. 45 at 3. However, there is no evidence to support this assertion, and Defendant Fu’s declaration states that he was merely covering an extra work shift at CTF at that time. *See supra* at 4. Furthermore, the Court notes that Plaintiff alleged in his health care grievance that Defendant Fu “was NOT and has NEVER BEEN [Plaintiff’s] PCP on 07/29/18.” Fu Decl., Ex. B at CDCR-00678 (original emphasis). Contrary to this earlier allegation, Plaintiff now claims that Defendant Fu *was* his PCP. But this fact is ultimately immaterial because there is no evidence that Defendant Fu knew that Plaintiff faced a substantial risk of serious harm and disregarded that risk when he decided to taper Plaintiff’s Methadone medication. *See Farmer*, 511 U.S. at 837. Plaintiff asserts in opposition that the information in his medical records was sufficient to raise an inference that Defendant Fu was aware of his need for chronic pain medication at the time he discontinued the Methadone. *See supra* at 13. However, Defendant Fu must both know of facts from which the inference could be drawn, and he must actually draw that inference. Plaintiff provides no evidence that Defendant Fu actually drew that inference. If Defendant Fu should have been aware of risk but was not, and here there is no evidence that he was, then Defendant Fu has not violated the Eighth Amendment, no matter how severe the risk. *See Gibson*, 290 F.3d at 1188. At most, Defendant Fu was negligent for failing to be aware of the risk, but negligence is not sufficient to make out a violation of the Eighth Amendment. *See Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

Lastly, with respect to Plaintiff’s claim that Defendant Fu was “levying reprisal” against him for not waiving his rights and liability when he saw Defendant Kowall for an orthopedic referral on July 25, 2018, this allegation is conclusory without any evidentiary support. The progress notes from the July 29, 2018 appointment with Defendant Fu shows

1 that Plaintiff was seen for his positive urine test for cannabis and refusal for right shoulder
2 procedure. Fu Decl., Ex. B at CDCR-000156. Plaintiff explained that he refused the
3 procedure because he did not want to sign a waiver for risks of surgery. *Id.* There is no
4 evidence that Defendant Fu was aware of Plaintiff's refusal to sign a waiver before
5 Plaintiff described the incident to him during this appointment. Rather, the evidence
6 shows that Defendant Fu knew Plaintiff tested positive for cannabis prior to seeing
7 Plaintiff, and that Defendant Fu intended to begin tapering Plaintiff off of Methadone at
8 this appointment because Plaintiff violated the pain contract. *Id.*; Fu Decl. ¶ 10.
9 Furthermore, Plaintiff offers no explanation as to what stake Defendant Fu had in the
10 waiver of liability from Defendant Kowall such that Defendant Fu had a reason to retaliate
11 against Plaintiff for his failure to sign. Rather, the undisputed facts are that Plaintiff tested
12 positive for marijuana during a random urine test on May 21, 2018, and that it violated
13 Plaintiff's pain contract. It is also undisputed that Defendant Fu ordered a gradual
14 Methadone taper over a two week period, and that Plaintiff received the full benefit of that
15 taper. To the extent that Plaintiff disagrees with the length and manner of tapering, it is
16 merely a difference of opinion between a prisoner-patient and prison medical authorities
17 regarding treatment which does not give rise to a § 1983 claim. *See Franklin v. Oregon*,
18 662 F.2d 1337, 1344 (9th Cir. 1981). There is also no evidence that Defendant Fu
19 intentionally did not refer Plaintiff to the Pain Management Committee or to COWS,
20 despite knowing that doing so would abate a substantial risk of serious harm to Plaintiff.
21 Rather, Defendant Fu saw Plaintiff for the first time and for the limited purpose of tapering
22 his Methadone on July 29, 2018. Defendant Fu knew that Plaintiff was to have follow-up
23 care with his PCP for alternate treatment of his shoulder and evaluations of pain, and that
24 Plaintiff could submit health care requests for any medical problems that arose. Plaintiff
25 provides no evidence in opposition showing that Defendant Fu was otherwise aware of an
26 excessive risk of harm to Plaintiff and chose to disregard it. Lastly, there is no evidence
27 that Defendant Fu had any further involvement in Plaintiff's medical treatment thereafter.

1 Rather, Plaintiff had several follow-up appointments with other physicians. Accordingly,
2 it cannot be said that the evidence regarding Defendant Fu's actions during the single
3 appointment he had with Plaintiff on July 29, 2018, is such that a reasonable jury could
4 return a verdict in favor of Plaintiff. *See Liberty Lobby, Inc.*, 477 U.S. at 248.

5 With respect to Defendant Posson, there is no genuine dispute of material fact that
6 he acted with deliberate indifference in deciding no intervention was necessary at the
7 Institutional Level Review of Plaintiff's health care grievance. Plaintiff claims that
8 Defendant Posson wrongfully took no action with respect to his request for physical
9 therapy. *See supra* at 11. However, as Defendants point out in reply, Plaintiff's health
10 care grievance makes no mention of a request for physical therapy; accordingly, Defendant
11 Posson could not have been deliberately indifferent for failing to address it. *See supra* at
12 14; Posson Decl., Ex. B at CDCR-00678-00680. Rather, Plaintiff's primary concern in the
13 health care grievance was with regards to his Methadone taper and the lack of alternative
14 pain medication. *Id.* Defendant Posson's decision was based on information in Plaintiff's
15 health record, which indicated that Plaintiff tested positive for cannabis, which is
16 undisputed. Plaintiff's use of cannabis violated his pain contract, which is also undisputed.
17 Accordingly, it appeared to Defendant Posson that the taper of Methadone ordered by
18 Defendant Fu on July 29, 2018, was appropriate. The plan thereafter was for Plaintiff to
19 have a follow-up with his PCP to discuss alternative pain management therapies, which is
20 also undisputed. Plaintiff thereafter had three follow-up appointments to discuss his pain
21 management, and at each visit the physician prescribed a trial of alternative pain treatment.
22 *See supra* at 5-6. Because this information indicated that Plaintiff's taper was appropriate
23 and that his need for alternative pain management therapies was being addressed, it cannot
24 be said that Defendant Posson knew of a substantial risk of serious harm to Plaintiff and
25 ignored it. As with Defendant Fu, Plaintiff asserts that information in his medical records
26 was sufficient to raise an inference that Defendant Posson was aware of Plaintiff's need for
27 chronic pain medication. *Id.* at 13. However, Defendant Posson must both know of facts

1 from which the inference could be drawn, and he must actually draw that inference.
 2 Plaintiff provides no evidence that Defendant Posson drew such an inference. If
 3 Defendant Posson should have been aware of risk but was not, that is mere negligence on
 4 his part, and is not sufficient to make out a violation of the Eighth Amendment. *See*
 5 *Toguchi*, 391 F.3d at 1060. Absent evidence that he actually drew the inference,
 6 Defendant Posson has not violated the Eighth Amendment, no matter how severe the risk.
 7 *See Gibson*, 290 F.3d at 1188.

8 Plaintiff cites to several cases which he asserts supports denying Defendants'
 9 summary judgment motion. Dkt. No. 45 at 13-15. However, these cases are mostly
 10 distinguishable from Plaintiff's case and therefore inapplicable and the last case provides
 11 support for granting summary judgment in favor of Defendants. The first case, *Anderson*
 12 *v. Kimura-Yip, et al.*, Case No. 2:12-cv-00261-MCE-KJN (2017), involved a case where
 13 opioid based therapy was stopped "cold turkey." Dkt. No. 45 at 13. That case is
 14 distinguishable from Plaintiff's case because as discussed above, his Methadone was not
 15 stopped "cold turkey" but tapered over a two-week period. The second case, *Donges v.*
 16 *Durett, et al.*, Case No. CIV S-09-0360-DAD (2011), involved a pretrial detainee who
 17 claimed inadequate medical and mental health care under the Fourteenth Amendment, and
 18 is therefore inapplicable to Plaintiff's Eighth Amendment claim. Dkt. No. 45 at 14. The
 19 third case, *Strain v. Sandham, et al.*, Case No. CIV S-05-0474-GEH-GGH (2009), also
 20 involved a case where methadone was stopped "cold turkey" upon an inmate's transfer to
 21 the prison, which is inapplicable to the facts of this case. Dkt. No. 45 at 14. The fourth
 22 case, *Owens v. Clark, et al.*, Case No. 2:15-CV-0982-TLN-KFN (2018), involved a
 23 morphine taper. Dkt. No. 45 at 14-15. However, the inmate in *Owens* claimed that he was
 24 denied any alternative pain management until the morphine was completely "washed out"
 25 of his system. Here, the undisputed evidence shows that Plaintiff was provided with
 26 alternative pain management therapies even before he was completely tapered off of
 27 Methadone. Lastly, *Hudson v. Nangalama, et al.*, Case No. CIV S-09-2328-CKD (2012),
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involved the issue of whether defendant provided medication to alleviate symptoms of withdrawal for Percocet. *Id.* Although the magistrate judge recommended that defendants' summary judgment should be denied on that claim, the district court did not adopt that recommendation and instead granted summary judgment, finding there was evidence that defendant prescribed alternative medication at the same time he took inmate off of Percocet. The Ninth Circuit affirmed the district court's grant of summary judgment on appeal. *Hudson v. Nangalama, et al.*, 505 Fed.Appx. 644, 2013 WL 2277001 (9th Cir. 2013). The facts of *Hudson* are similar to the case at bar, and therefore supports a grant of summary judgment in favor of Defendants rather than Plaintiff.

Based on the undisputed facts, Defendants have shown there is an absence of a genuine dispute of material fact with respect to the Eighth Amendment claims against them. *See Celotex Corp.*, 477 U.S. at 323. Plaintiff has failed to meet his burden of identifying with reasonable particularity the evidence that precludes summary judgment, *see Keenan*, 91 F.3d at 1279, or submit evidence from which a jury could reasonably render a verdict in his favor, *In re Oracle Corporation Securities Litigation*, 627 F.3d at 387. Accordingly, Defendants Fu, Posson, and Votaw are entitled to summary judgment on all the claims against them. *See Celotex Corp.*, 477 U.S. at 323.

CONCLUSION


For the reasons stated above, Defendants Dr. Law Fu, M. Votaw, and S. Posson's motion for summary judgment is **GRANTED**. Dkt. No. 29. The Eighth Amendment deliberate indifference claims against them are **DISMISSED** with prejudice.

The Clerk shall terminate these Defendants from this action.

This order terminates Docket No. 29.

IT IS SO ORDERED.

Dated: September 1, 2020


BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

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Order Granting MSJ
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